(1)

No. ____ 2004

In the
Supreme Court of the United States

JOHN CHARLES BARR

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does a state prosecutor who withholds evidence favorable to the to the accused until after the defendant enters a plea of guilty violate the due process clause of the Fifth Amendment as made applicable to the States through the due process clause of the Fourteenth Amendment?

RULE 29.6 STATEMENT

Petitioner

Petitioner is John Charles Barr, M.D.. Dr. Barr is the defendant in the district court and the appellant in the court of appeals. Pursuant to Supreme Court Rule 29.6, Dr. Barr has no parent companies or wholly owned subsidiaries.

Respondent

Respondent is the State of Texas represented by John Roach, the district attorney for Collin County, Texas. Pursuant to Supreme Court Rule 29.6, petitioner is unaware of any parent or wholly owned subsidiary for the district attorney's office.

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Charles Barr, M.D. respectfully requests the Court grant petition for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals to refuse a petition for discretionary review from the judgment of the Eleventh Court of Appeals for the State of Texas in this case.

OPINIONS BELOW

The Texas Court of Criminal Appeals denied a petition for discretionary review in this case without opinion on March 24, 2004. A copy of the judgment is attached as Appendix A. The opinion of the Eleventh District Court of Appeals for the State of Texas affirming the District Court is unreported and is attached as Appendix B. The District Court's judgment is unreported and attached as Appendix C.

JURISDICTION

The Texas Court of Criminal Appeals refused the defendant's petition for discretionary review on March 24, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides in relevant part: "No person shall. . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law". U.S. CONST. amend. V.

The Due Process Clause of the Fourteenth Amendment applies the constitutional requirements of the Fifth Amendment to the States through the following language: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend. XIV.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below

On December 11, 2002, John Charles Barr, M.D. stood accused by indictment of a second degree felony offense of aggravated assault with a deadly weapon in the 219th Judicial District Court, Collin County, Texas. Prior to the trial of this case, counsel for Dr. Barr filed several pretrial motions attempting to secure exculpatory evidence to the accused, testimony of the complaining witness, and other pertinent evidence that was within the control of the State. Specifically, counsel filed a motion for discovery requesting that the State provide any witness statements given to the police as well as any evidence favorable and material to either guilt or punishment to the defendant. Counsel also filed a request to depose the complaining witness prior to trial. The Court ordered that State provide any favorable evidence material to either guilt or punishment to the Defendant prior to trial. The Court denied counsel's request to depose the complaining witness, but required that the State produce the statements after witnesses direct testimony at trial. These motions are contained within Defendant's Motion for New Trial which is attached as Appendix D.

The State filed the State's Response to Defendant's Request for Discovery representing that there was no evidence favorable to the Defendant within the State's possession and that any witness statements would be provided at the time of cross-examination. Based the State's response to defendant's request for discovery, Dr. Barr entered a plea of guilty to the offense of aggravated assault with a deadly weapon and proceeded to trial regarding punishment. During the punishment hearing, defense counsel hears for the first time that the complaining witness pulled his vehicle in front of Dr. Barr's vehicle then intentionally engaged the brakes on his motor vehicle while directly in front of Dr. Barr's rapidly approaching truck which was pulling a trailer. Reacting to the threat caused by Mr. Hixon's vehicle, Dr. Barr slowly pulled a pistol while driving past Mr. Hixon, calmly drove past Mr. Hixon's vehicle lowering the gun once the threat subsided and Dr. Barr was safely past Mr. Hixons's vehicle. The testimony at trial was clear that Dr. Barr drove calmly from the scene and that Mr. Hixon followed Dr. Barr for several miles. Despite counsel's repeated requests and an order from the trial court to provide exculpatory evidence, the prosecutor failed to provide this exculpatory evidence that would support a defense of self-defense under Texas law.

At the conclusion of the punishment trial, the Honorable Marvin Marshall sentenced Petitioner to a term of four (4) years imprisonment in the Texas Department of Criminal Justice and a fine of $410.70 as a term and condition of parole. On December 17, 2002, Petitioner filed a Motion for New Trial asserting that the defendant would not have plead guilty but rather insisted on a trial regarding innocence had the exculpatory evidence been properly revealed to the Petitioner in a timely fashion as required under the district court's orders. Petitioner's Motion for New Trial was

overruled on February 24, 2003. Petitioner timely filed a notice of appeal from the trial court's judgment.

The Eleventh Court of Appeals for the State of Texas issued an opinion affirming the judgment of the trial court on October 23, 2003. The appellate court held that Petitioner had waived his right to complain of the State's failure to disclose evidence favorable to the accused by entering a plea of guilty. In addition, the appellate court also held that the suppressed statement did not constitute evidence favorable to the accused.

Petitioner timely filed his Petition for Discretionary Review with the Texas Court of Criminal Appeals on December 29, 2003. The Texas Court of Criminal Appeals refused the petition for discretionary review on March 24, 2004.

II. Statement of Facts

John Charles Barr was indicted on the charge of assault with a deadly weapon on January 30, 2002 as the result of an incident between Dr. Barr, who was driving his Jeep Cherokee, and Mr. Mark Hixon, who was driving his vehicle eastbound on Texas Highway 380 outside McKinney in eastern Collin County, Texas on September 6, 2001. Dr. Barr testified that he was driving eastbound on State Highway 380 in the left-hand lane when complaining witness Mark Hixon pulled his vehicle from the right-hand eastbound lane in front of his Jeep Cherokee to pass an eastbound eighteen-wheeler that was traveling in the right-hand eastbound lane. Mr. Hixon indicates that as he was positioning his vehicle in the passing lane that Dr. Barr's Jeep, which was pulling a trailer, was closing in to the rear of Mr. Hixon's vehicle. In trial, defense counsel hears for the first time that Mr. Hixon

engaged his brakes on his vehicle while directly in front of Dr. Barr's rapidly approaching truck which was in close proximity to Mr. Hixon's vehicle. Mr. Hixon's statement was contained in Mr. Hixon's statement which was obtained by the State on September 6, 2001. This statement would support a defense of self-defense under Texas law as Mr. Hixon was clearly operating his vehicle as a weapon to threaten Dr. Barr by intentionally engaging his brakes in front of Dr. Barr's rapidly approaching vehicle. There is no indication in Mr. Hixon's statement that he applied his brakes for any other reason other than that Dr. Barr's vehicle was quickly approaching from the rear of Mr. Hixon's vehicle. The exculpatory information within the statement is material to both innocence or guilt and punishment proceedings. Mr. Hixon further testified that as Dr. Barr passes Mr. Hixon, Dr. Barr lifts a gun with a laser sight activated which reflects the laser light into Mr. Hixon's vehicle. After passing his vehicle, Mr. Hixon indicates that Dr. Barr drove in a normal manner continuing eastbound on Highway 380. Mr. Hixon called the police and followed Dr. Barr's vehicle until the police pulled over the vehicle. There are no other witnesses on the road.

Counsel for Dr. Barr took every possible step to obtain Mr. Hixon's statement prior to trial of this matter.[1] *See* Appendix D. The trial court granted defendant's previous

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[1] Counsel filed a motion to depose Mr. Hixon, independently wrote letters to Mr. Hixon requesting a conference so that counsel could obtain the necessary facts for this case, and filed a motion for discovery requesting the State to provide both witness statements and any evidence in the possession of the state, including impeachment evidence, which is favorable to the defendant and material either to guilt or punishment prior to the trial of the matter. The trial court denied the motion for deposition. Mr. Hixon failed to respond to phone calls or written correspondence.

discovery request for the State to disclose any evidence favorable to the accused. The State's response to the defendant's discovery stated that there was no favorable evidence to the accused prior to trial. On cross-examination, Mr. Hixon stated that he provided the State with a statement on September 6, 2001. The relevant portion of the witness statement contains the following:

> "I was in the right lane with an 18 wheeler ahead of me about 1 mile. There was a - jeep in the left lane slightly behind me. After passing Bridgefarmer Road starting up 1st hill I was gaining on 18 wheeler. I glanced in my side view mirror and felt I was clear of the jeep. I changed from the right lane to the left. About the time I was even with the 18 wheel I saw the jeep speed up and get right on my bumper. While I accelerated the jeep was even closer, **I stepped on my brakes** and then accelerated past the 18 wheeler and moved back to the right lane." (emphasis added) Appendix D.

Despite previous efforts to obtain all exculpatory evidence, counsel for the accused was presented with Mr. Hixon's statement only after Dr. Barr had plead guilty to the offense, after the State had completed Mr. Hixon's direct examination, and at the beginning of defense counsel's cross-examination. Mr. Hixon's statement contains exculpatory evidence that Mr. Hixon was trying to use his vehicle as a weapon to threaten Dr. Barr by intentionally engaging the brakes on his vehicle, knowing that Dr. Barr's vehicle was closing on Mr. Hixon's vehicle. The suppressed statement is favorable and material to the defense because it provides legal justification for Dr. Barr's subsequent actions. This suppressed evidence may have resulted in a not guilty verdict if this matter had proceeded to a jury trial. The State not only

withheld this evidence until Dr. Barr had already entered his plea of guilty but affirmatively stated in its response to discovery that no evidence favorable to the defendant existed.

Unaware of the evidence to support his claim of self-defense within the prosecutor's possession and relying on the State's affirmative responses that there was no available information that was favorable to the defense, Dr. Barr plead guilty to the offense and sought deferred adjudication from the Court during the trial on punishment. The prosecution's refusal to provide a copy of the exculpatory material evidence despite the existence of the trial court order to disclose such material denies Dr. Barr of his right to due process of law under the Fifth Amendment as made applicable to the States by the Fourteenth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

The appellate court and the trial court erred in refusing to grant Petitioner a new trial based on the prosecution withholding exculpatory evidence favorable to the Petitioner until after the defendant had entered his plea of guilty despite counsel for the accused exhaustive attempts to acquire the statement and the trial court's order on discovery that the prosecutor provide the exculpatory evidence thus violating the due process clause of the Fifth Amendment as made applicable to the States through the due process clause of the Fourteenth Amendment. *Brady v. Maryland,* 373 U.S. 83 (1963).

Petitioner concedes that this Court has recently held that Fifth and Sixth Amendment do not require a federal prosecutor to disclose impeachment information relating to any informants or other witnesses prior to a guilty plea in

federal cases. *United States v. Ruiz*, 536 U.S. 622 (2002). The present case is different from *Ruiz*, however, as Petitioner submitted repeated requests for the exculpatory evidence and obtained a court order that the State turn over the exculpatory information which is not present in *Ruiz*. Moreover, as a defendant in Texas state court, Petitioner was not provided the alternative of the 'fast track' plea offered by the United States attorney in *Ruiz* nor is he afforded the federal safeguards regarding guilty pleas provided by Rule 11 of the Federal Rules of Criminal Procedure to a defendant in federal court. Finally, the suppressed information in this case related to the only other fact witness in this case, and not the type of government information which could disrupt ongoing investigations and expose prospective witnesses to serious harms that was expressed by the Court in *Ruiz*.

The Court should grant this writ of certiorari to clarify that the constitutional protection of due process as described by *Brady v. Maryland* apply to state court defendants which require a prosecutor to disclose exculpatory statements within the State's possession in the face of a valid request or court order.

I. The principles underlying *Brady* require pre-plea disclosure of material exculpatory evidence.

The *Brady* rule is based on the guarantee to an accused of a just process, in which the Government has an overriding duty to see that justice is done. This Court has consistently held that the adjudication of guilt at trial is dependent on the presentation of truth. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). In *Mooney,* the Court held that where the prosecution contrives a conviction through misrepresentation, the conviction and the resulting punishment are 'inconsistent with the rudimentary demands of justice. *Mooney*, 294 U.S. at

112 . The Court has recognized that the prosecutor plays a special role in our criminal system and where the prosecutor fails to disclose information that bears on the truth of the matter, he or she contributes to an adjudication that 'does not comport with standards of justice. . .' *Brady v. Maryland,* 373 U.S. 83, 88 (1963). The prosecutor, and the government's job, is to see that justice is done, and the release of exculpatory information prior to the plea stage supports that goal. *United States v. Bagley*, 473 U.S. 667 (1985). In contrast, society's confidence in the criminal justice system is undermined when the State suppresses exculpatory evidence in the face of a court order while trying to secure a guilty plea from a defendant.

The parties in the criminal justice system do not enter into the trial court on level ground with respect to information obtained regarding the charges in a case. The prosecutor begins the case with the completed investigation of the State that is used to indict the accused. The investigation contains at least enough information to raise to the level of probable cause before the case is presented to the grand jury and given to trial counsel. Counsel for the accused doesn't have the ability to start his investigation until the case is actually filed with the court. Even when the case is filed, this Court has recognized that there is no general constitutional right to discovery in a criminal case and therefore the defendant does not have the right to discover the evidence in his case from the prosecution. *United States v. Agurs*, 427 U.S. 97, 109 (1976). However, defense counsel can then petition the court and the State to provide the information through criminal discovery.

The Court based the *Brady* rule of disclosure of exculpatory evidence by the State on basic fairness within the criminal justice system stating that "[s]ociety wins not only

when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. The release of exculpatory information has historically applied not only to the guilt or innocence portion of the trial, but to punishment as well. In fact, the facts in *Brady* presented a prosecutor's duty to release exculpatory information with regard to the sentencing of the defendant. *Brady*, 373 U.S. at 86. The obligation to disclose exculpatory information exists throughout the life of the case and even through post-conviction litigation. Society benefits from this duty as our criminal justice system is founded on the concept that the government should err on the side of allowing a guilty person to be free than the possibility of convicting an innocent person. These concepts apply with equal vigor to a citizen who pleads guilty to an offense.

The Court has long recognized that the failure to release exculpatory information, however, creates an unfair trial for the defendant.

Due to the overriding goal and concern to seek the truth before placing a conviction on the accused, this Court has fashioned rules requiring that the State disclose exculpatory material to defense counsel that may make a significant difference in either adjudication of guilt or in the facts related to sentencing decision. The affirmative duty to disclose the exculpatory information attaches as soon as the information comes into the prosecutor's possession and the information must be disclosed in time for defense counsel to put the information to effective use at trial. *Kyles v. Whitley,* 514 U.S. 419, 433-434 (1995), *Brady*, 373 U.S. at 87-88 .

When prosecutors do not disclose such information, they compromise the integrity of the proceedings both the fact-

finding process at trial and sentencing and on review by a higher court. The Court has been witness to situations where prosecutors have failed to provide this exculpatory evidence in the past. *Giglio v. United States*, 405 U.S. 150 (1972). The fact that prosecutors are human beings placed in our adversarial system provides the opportunity for a failure to release information that could lead to an incorrect conviction such as this case.

The Court should clarify that prosecutors should produce exculpatory information as soon as it is received so that defense counsel can make an intelligent and voluntary decision before entering a plea in a criminal case. Relieving the prosecutor of the duty to provide *Brady* material when a conviction results from a guilty plea rather than a trial directly contravenes the Court's long-standing jurisprudence that the *Brady* rule applies not only to the guilt phase, but also to sentencing, and post-conviction procedures for relief from improper convictions. *Strickland v. Greene*, 527 U.S. 263 (1999).

In *Strickland*, Justice Souter clarified that the *Brady* enquiry does not stop with the conviction but goes to each phase of the sentencing process. *Id.* at 297. (Souter, J. concurring in part and dissenting in part).

II. A plea entered without disclosure of *Brady* material is involuntary and therefore invalid.

This Court has held that certain crucial assurances to accuracy and a fair trial still apply to a guilty plea. For example, the Court has held that the Sixth Amendment right to effective counsel applies in a guilty plea context. *See Hill v. Lockhart*, 474 U.S. 52 (1985). In *Hill*, the Court stated that when an accused represented by counsel enters a guilty

plea upon the advice of counsel that the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 56. Therefore, a plea of guilty based on substandard advice is involuntary and invalid. The Court discussed an example where the alleged error of counsel is the failure to discover potentially exculpatory evidence. *Id* at 370. The Court stated that the determination of whether the error prejudiced the defendant was based on the likelihood that the discovered evidence would have led counsel to change his recommendation to the plea bargain. This likelihood would be necessarily based on whether the evidence would change the outcome of the trial. Thus, the failure of defense counsel to discover exculpatory evidence that would cause counsel to advise the rejection of a plea agreement would violate the Sixth Amendment right to counsel, undermine society's confidence in a fair trial, and would invalidate the plea.

Similarly, society's confidence in a fair trial is undermined when defense counsel takes every step possible to discover exculpatory evidence solely within the possession of the State, the State suppresses the evidence and the defendant pleads guilty. *Brady*, 373 at 87. The guilty plea entered in this situation is not made intelligently and voluntarily as the defendant cannot possess an understanding of the law as applied to the facts of his case. Moreover, the accused is denied this required understanding through no dereliction of his own duties to investigate the case, but rather due to the State's wrongful suppression of exculpatory evidence. The Court should grant a writ of certiorari to clarify that a defendant's due process right to exculpatory information that is within the possession of the State should apply in a guilty plea.

III. A plea entered without disclosure of *Brady* material is invalid as based upon a misrepresentation or impermissible conduct by the prosecution.

A plea entered without disclosure of existing exculpatory evidence in the face of a trial court order for the State to disclose this information invalidates a guilty plea because the plea is then based on "misrepresentation or other impermissible conduct by state agents." *See Miller v. Angliker,* 848 F.2d 1312, 1320 (2nd Cir. 1988) citing *Brady*, 397 U.S. at 757. Since a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case, and by information that may be available to cast doubt on the fact or degree of his culpability, even a guilty plea that was "knowing" and "intelligent" may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution. *Miller*, 848 F.2d at 1320 quoting *Brady*, 397 U.S. at 756-757. The affirmative duty by the prosecution to disclose evidence favorable to the accused is based in part on the rules against misrepresentation by an officer of the court. *See Kyles*, 514 U.S. at 432.

Justice Blackmun wrote of the Court's recognition that a prosecutorial failure to respond to a *Brady* request impairs the adversary process since the failure to respond not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. *Bagley,* 473 U.S. at 682. In *Bagley*, Justice Blackmun went further to state: ' . .the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not

exist, and to make **pretrial** and trial decisions based on this presumption. *Bagley,* 473 U.S. at 682 (emphasis added).

In this case, counsel for the accused specifically requested that the State disclose any exculpatory evidence. Moreover, counsel for the accused secured an order from the court for the State to disclose any exculpatory evidence. *See* Appendix D. The State's representations within their discovery request indicate that no exculpatory evidence existed. Based on prosecutor's affirmative representation, Petitioner entered a plea of guilty. The exculpatory statement was then disclosed during the punishment phase of the trial. The Court should grant this writ of certiorari to allow Petitioner to withdraw his plea that was entered based on the misrepresentations of the State within their discovery responses

IV. The adversarial system requires *Brady* disclosure in order to maintain the integrity of our criminal justice system.

This Court has consistently held that due process requires that the prosecution provide a defendant with evidence material either to guilt or punishment which is favorable to the accused irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87. The Court later clarified that the prosecution need only provide material information under this rule. *Kyles,* 514 U.S. 419, 433-34 (1995). Evidence is deemed material under *Brady* if there is a reasonable probability that, had the evidence been properly disclosed to the defense, the result of the proceeding would be different. *Bagley,* 473 U.S. at 682. The *Brady* rule is founded on ' the overriding concern with justice regarding the finding of guilt.' *Agurs*, 427 U.S. 97 at 112.

The American criminal justice system is an adversarial system. The system places two litigators working together in the search for truth while competing against each other for the ultimate victory for their client. The concept behind *Brady* is that the disclosure of exculpatory evidence can only increase the accuracy of the criminal justice system by eliminating the ignorance of a material exculpatory evidence possessed by the prosecution which may lead to an acquittal of the accused.

A unique situation in the adversarial system exists when the prosecutor within the adversarial system is not provided with any oversight as to the decision of which evidence is exculpatory and should be disclosed. Namely, if exculpatory evidence exists in a case then that case will be more difficult for the prosecutor to achieve a victory in the form of a conviction than an identical case where no exculpatory evidence exists. This phenomenon creates an incentive for the prosecutor to achieve a conviction through a plea bargain by lowering the plea offer for the defendant. For this reason, the requirement that the prosecutor should disclose only exculpatory evidence that is material is met in the plea bargain process– the evidence would be material to punishment as it will directly effect the prosecutor's offer to the accused and will directly effect the trial court's judgment if there is no agreement.

The same phenomenon also creates an incentive for the prosecutor to withhold exculpatory evidence that should be disclosed until after the accused enters a guilty plea. Under *Ruiz*, the prosecutor's failure to disclose the exculpatory evidence is effectively insulated on appeal. In this case, the prosecutor did not disclose the exculpatory evidence until after the State had secured a plea of guilty from the defendant. At that point, the current Texas rule does not allow the appellate court to review the State's failure to disclose if the

judgment is rendered independent of and not supported by the error. *See Young v. State*, 8 S.W. 3d 656, 667 (Tex. Cr. App. 2000).

Disclosure of the exculpatory evidence in a timely manner in this case would have allowed Petitioner's counsel to explore a defense of self-defense which would provide not only a defense in the innocence or guilt phase of the trial, but would also provide a mitigating circumstance for the Court to determine during the punishment phase of trial, if necessary. However, the failure to disclose the exculpatory information until after the Defendant has entered a plea of guilty improperly insulates the prosecutor's decision from appellate review and undermines society's confidence in the criminal justice system. The Texas appellate court's ruling that Dr. Barr has waived this point by pleading guilty has the effect of encouraging the State to withhold favorable evidence to the accused until after the accused has plead guilty since the State's failure to disclose the favorable evidence will be insulated from appellate review and the defendant has no remedy for the prosecutor's failure to disclose the exculpatory evidence.

In this case defense counsel was denied the opportunity to review the statement until **after** Dr. Barr had entered his plea even though the State had knowledge and possession of the exculpatory evidence prior to the entry of the plea. The State's failure to disclose the exculpatory testimony until after the guilty plea adversely affected the preparation and presentation of appellant's case and creates a situation of trial by ambush. If the prosecution is required to disclose exculpatory evidence to defense counsel, then this Court must provide an effective appellate review of such disclosures. Without appellate review, the prosecutor, who is the sole initial judge as whether evidence is exculpatory, has no

incentive to disclose even the existence of the material as no appellate court will be allowed to review the evidence in question. The Defendant is then denied the benefit of that exculpatory evidence, due to the prosecutor's discretion, despite exhausting every avenue available for discovery.

The effect is to have the fox guarding the hen house, as the prosecution can actively conceal the existence of the exculpatory evidence hoping that an accused will plead guilty, and not be subject to appellate review for this denial of the due process.

V. The suppressed information is a *Brady* violation.

This Court has defined favorable evidence for purposes of *Brady* violations as "any evidence that if disclosed and used effectively, may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. Favorable evidence includes both exculpatory and impeachment evidence. *Giglio*, 405 U.S. 150. Impeachment evidence, as well as exculpatory evidence falls within the definition of favorable evidence because if disclosed and used effectively it may make the difference between conviction and acquittal.

A. The suppressed statement is favorable to Petitioner

Mr. Hixon's statement indicated that he saw Dr. Barr's Jeep and pulled his vehicle in front of the Jeep. As the Jeep continued to gain on Mr. Hixon's vehicle, Mr. Hixon intentionally engaged the brakes on his vehicle. Mr. Hixon did not apply his brakes out of necessity but instead engaged his brakes using his car as a weapon against Dr. Barr. Mr. Hixon's actions immediately preceded Dr. Barr's alleged actions under the indictment. Mr. Hixon's actions as

described in the written statement provide a clear understanding of the events that day and a legal justification for Dr. Barr's actions to Mr. Hixon. If this exculpatory evidence had been timely provided to the defense, a reasonable probability exists that the result of the proceeding would have been different because the defense could have presented a defense of legal justification during the guilt or innocence phase of trial. This suppressed exculpatory information was favorable to Dr. Barr and if used effectively the suppressed information could have been the difference between a conviction and an acquittal.

B. The suppressed evidence was material to John Charles Barr's guilt or innocence and punishment.

The suppressed statements are also material to Dr. Barr's case. Evidence is material only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different. *Bagley*, U.S. 473 at 682. If the evidence is disclosed during the course of trial, the court must assess whether there is a reasonable probability that the timing of the disclosure adversely affected the defense's preparation or presentation of its case. *Bagley*. 473 U.S. at 683. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" *Id.*

In this case, defense counsel in this case requested favorable evidence putting the prosecution on notice of the value that the defense placed on the evidence. The defense is allowed to assume from the nondisclosure that such evidence does not exist and to make pretrial and trial decisions on the prosecutor's response. *Bagley*, 473 U.S. at 682-683.

The suppressed statement in this case includes information that would have allowed counsel to present a legal theory of justification or self-defense and would have materially affected the way that counsel prepared for the case. Mr. Hixon's actions as described in the written statement provide a clear understanding of the events on that day and provide a legal justification for Dr. Barr's actions. The statement provides that Mr. Hixon intentionally engaged his brakes in front of Dr. Barr's rapidly approaching vehicle using the vehicle as a weapon. The statement also clearly provides that Dr. Barr raised the gun until he was safely past the threat caused by Mr. Hixon and that Dr. Barr continued on his way once he was past Mr. Hixon's threat. The defense could present a defense of self-defense or justification under Texas law arguing that Dr. Barr feared that Mr. Hixon might take further actions with his vehicle to continue to endanger Dr. Barr's life. If counsel for the accused had been given the opportunity to use this information effectively a reasonable probability sufficient to undermine the outcome of this proceeding exists that Dr. Barr's actions would have been justified and Dr. Barr could have been exonerated at trial of guilt or innocence. At a minimum, counsel for the accused could have used the information to lower the punishment assessed during the punishment phase of trial.

The State's action in suppressing evidence which was favorable to the defense and material to either the guilt or punishment in the face of a valid order from the Court constituted a material error in the proceeding that effected both Dr. Barr's decision to proceed to a bench trial and the outcome of the punishment phase of trial.

This Court has long held that the suppression of evidence favorable to an accused by the prosecution upon the request of the accused violates due process where the evidence is

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Bagley,* 473 U.S. at 679, *Brady*, 373 U.S. 83. To ensure the accused a fair trial, a prosecutor has an affirmative duty under the Due Process Clause of the Fourteenth Amendment to turn over to the accused all exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33, (1995); *Brady*, 373 U.S. at 87. Not only does the affirmative duty attach as soon as the information comes into the prosecutor's possession but the information must be disclosed to the accused in time to put it to effective use at trial. *Id* The more specifically the defense requests certain evidence, the more reasonable it is for the defense to assume from the non-disclosure that such evidence does not exist and to make pretrial and trial decisions on that basis. *Bagley,* 473 U.S. at 682-683,. When a prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. *Agurs*, 427 U.S. at 106.

In this case the trial court issued an order requiring the State to release documents that were favorable to the defendant. The State responded in responses to discovery that were filed with the Court that no such evidence existed despite the fact that Mr. Hixon had submitted his written statement to the police department on September 6, 2001. The State failed to release Mr. Hixon's written statement until the statement was discovered by defense counsel on cross-examination of the witness- after Dr. Barr had plead guilty to the offense relying on the State's responses to his discovery requests that were filed with the Court. The State suppressed the statements until after the prosecutor had secured the plea of guilty undermining the confidence of a fair trial of the accused and therefore the entire criminal justice system. This court should grant writ of certiorari in this matter to clarify that state prosecutors should disclose exculpatory evidence within

the State's possession to the accused in a timely manner even in cases that may ultimately plea guilty.

CONCLUSION

For the forgoing reasons, Appellant prays that this Court will grant this Petition for a writ of certiorari.

Respectfully submitted,

John L. (Lin) McCraw, III
Counsel of Record
McCraw & McCraw
1415 Harroun
McKinney, Texas 75069
Tel. (972)562-6262
Fax. (972)548-0454
Counsel for Petitioner

APPENDIX A

COURT OF CRIMINAL APPEALS OF TEXAS

Case No. PD-1966-03

[Filed March 24, 2004]

JOHN CHARLES BARR,	)
Appellant,	)
	)
v.	)
	)
STATE OF TEXAS,	)
Appellee.	)
	)

OPINION

Appellant's Petition for Discretionary Review Refused

APPENDIX B

COURT OF APPEALS OF TEXAS,
ELEVENTH DISTRICT,
EASTLAND

Case No. 11-03-00030-CR

[Filed October 23, 2003]

John Charles Barr,	)
Appellant,	)
	)
v.	)
	)
State of Texas,	)
Appellee.	)
	)

Appeal from Collin County.

JUDGES: Panel consists of: Arnot, C.J., and Wright, J., and McCall, J.

OPINION

John Charles Barr entered an open plea of guilty to the offense of aggravated assault with a deadly weapon. The trial court convicted him and assessed punishment at confinement for four years. We affirm.

In his sole issue on appeal, appellant contends that the trial court erred in failing to grant his motion for new trial because the State failed to turn over favorable *Brady*[1] material -- the written statement of the complainant, Mark Earl Hixon. We hold that appellant has waived this issue.

Under *Young v. State*, 8 S.W.3d 656, 667 (Tex.Cr.App.2000), "a valid plea of guilty or nolo contendere 'waives' or forfeits the right to appeal a claim of error" if "the judgment of guilt was rendered independent of, and is not supported by, the error." By pleading guilty, appellant waived the issue that he asserts on appeal because he entered a valid guilty plea and because the judgment was rendered independent of, and is not supported by, the State's failure to turn over Hixon's statement prior to the trial date. *See Jacobs v. State*, 80 S.W.3d 631, 632 (Tex.App. - Tyler 2002, no pet'n).

Moreover, Hixon's statement did not constitute *Brady* material. After appellant entered his guilty plea, a punishment hearing was held during which Hixon testified. During cross-examination, defense counsel was provided with the statement. In the statement, Hixon stated that, as he was in the left lane of the highway accelerating in order to pass a truck, he noticed a jeep "right on [his] bumper." Appellant was driving the jeep. Hixon indicated that he "stepped" on his brakes and then accelerated past the truck and moved back into the right lane. Shortly thereafter, appellant drove up next to Hixon, rolled down his window, and pointed a large-caliber automatic handgun with a laser sight at Hixon's face. Appellant contends that Hixon's admission that he "stepped"

---

[1] *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

on the brakes was favorable and material. We disagree. Contrary to appellant's assertion, Hixon's act of stepping on the brakes did not constitute a defense to the subsequent aggravated assault, which appellant committed by pointing a deadly weapon at Hixon's face. Appellant's sole issue is overruled.

The judgment of the trial court is affirmed.

W. G. ARNOT, III

CHIEF JUSTICE

APPENDIX C

IN THE DISTRICT COURT
219TH JUDICIAL DISTRICT COURT
COLLIN COUNTY, TEXAS

Case No. 219-80130-02

[Entered December 11, 2002]

THE STATE OF TEXAS)
)
VS.)
)
JOHN CHARLES BARR)
)

JUDGMENT ON PLEA OF GUILTY OR
NOLO CONTENDERE
BEFORE COURT - WAIVER OF JURY TRIAL -
NO COMMUNITY SUPERVISION

Judge Presiding: *Marvin Marshall*

Date of Judgment: *December 11, 2002*

Attorney for State: *Lisa R. P. Gregg*

Attorney for Defendant: *Lin McCraw*

Offense Convicted of: *Aggravated Assault with a Deadly Weapon*

Date Offense Committed: *September 6, 2001*

Degree: *Felony Second Degree*

Charging Instrument: *Indictment*

Plea: *Guilty*

Plea to Enhancement Paragraph(s): *Not Applicable*

Findings on Enhancement: *Not Applicable*

Findings on use of Deadly Weapon: *Affirmative*

Date Sentence Imposed: *December 11, 2002*

Costs: $410.70 as a term and condition of parole.

Punishment and Place of Confinement: *four (4) years confinement in the Texas Department of Criminal Justice,* ***Institutional Division***

Date to Commence: ***December 11, 2002***

Time Credited: ***One (1) day***

Total amount of Restitution/Reparation: ***0.00 (to be paid as a term and condition of parole)***

Concurrent Unless Otherwise Specified:

Restitution to be Paid To:
Name: ***Not Applicable***
Address:

ON THIS DAY set forth above, this cause came on for trial. The State of Texas appeared by the above-named attorney, and the defendant appeared in person in open court with the above-named attorney for the defendant. Both parties having announced ready for trial. WHEREUPON, the defendant in person and in writing and with the approval of the attorney for the defendant in open court agreed to waive a jury in the trial of this cause and submit the same to the court, such waiver being joined and consented to by the attorney for the State; and the court approved the same.

THEREAFTER, the defendant was arraigned on the offense shown above: and entered, a plea as shown above, as well as a plea to each enhancement paragraph, if any as shown above; or, if shown above, the attorney for the State waived one or more such paragraphs.

THEREUPON, it having appeared to the court that the defendant has a sufficient understanding of the English language, either by the defendant's own hearing and knowledge or through a proper translator, and that the defendant is mentally competent, the court duly admonished the defendant as the consequences of such plea or plea as shown above. The court having further determined that the defendant is uninfluenced in making said plea by any consideration of fear or by any persuasion of delusive hope of pardon prompting the said defendant to confess guilt, and seeing that the defendant persisted in entering such plea, the court finds such plea to be free and voluntary and accepts same to be entered of record herein.

WHEREFORE, the defendant in open court and in writing with the express approval of the attorney for the defendant, having waived the reading of the instrument charging the offense shown above and the appearance and the right to confront and cross-examination witnesses against the defendant, and having agreed evidence in this cause may be stipulated and the introduction of such consented to in the form of affidavits, written statements, and any other documentary evidence, such waiver and consent having been approved by the court and filed in the papers of this cause, the court, having heard the defendant's plea, the evidence submitted, and the arguments of counsel, is of the opinion, and so finds that the defendant is guilty as charged of the offense set forth above and that the enhancement paragraphs, if any, not previously waived by the State are true or not true as shown above.

IT IS THEREFORE CONSIDERED AND ORDERED by the court, in the presence of defendant, that said judgment to be, and the same is hereby, in all things approved and confirmed; and following a proper waiver of a jury in accordance with law, that said defendant having been asked by the court if the defendant had anything to say in law why sentence should not be pronounced against the defendant, and answered nothing in bar thereof, the said defendant is hereby sentenced to a term of imprisonment or fine, or both, as set forth above; and that said defendant be delivered by the Sheriff of Collin County to the Director of the Texas Department of Criminal Justice, Institutional Division, or other person legally authorized to receive such convict for the particular punishment assessed herein.

THE COURT FURTHER FINDS, if shown above, that the defendant used or exhibited a deadly weapon during the

commission of the offense shown above, or during immediate flight therefrom.

IT IS FURTHER ORDERED that the State of Texas do have and recover of the defendant all costs in this proceeding expended which costs are set forth above, for which execution may issue against property of the defendant, as necessary.

FURTHER, AS TO RESTITUTION, if it be shown above by an amount in dollars and cents that the defendant should pay one or more persons restitution or reparation for the commission of the above-named offense, the court FURTHER FINDS, after considering all of the evidence in this case that said amount of restitution or reparation or both, as shown above is due and owing by the defendant.

IT IS FURTHER ORDERED that the judgment is entered as of the date of judgment shown above; the sentence is to commence as of the date shown above; and credit is given for time defendant has already served, if any, as shown above, for the above offense.

FURTHER, AS TO PUNISHMENT, if it be shown as cumulation above that the defendant has been duly and legally convicted of a prior offense by showing the place and court, cause number and offense, together with the punishment for such offense and date defendant as sentenced for such offense in accordance with such conviction, then it is also ORDERED AND ADJUDGED that the punishment herein adjudged against said defendant shall begin with the judgment in such prior offense as shown above shall have ceased to operate.

IT IS FURTHER ORDERED that the defendant shall be confined for the above-named term, if such a term of confinement be shown above, in accordance with the

provisions of law governing such punishment; and execution may issue, as necessary, and the defendant is remanded to jail until the Sheriff of Collin County can obey the direction of the judgment.

Fingerprint from:

Right Index

/s/
PRESIDING JUDGE

December 12, 2000
DATE SIGNED

NOTICE OF APPEAL

APPENDIX D

No. 219-80130-02

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	219th JUDICIAL DISTRICT
	§	
JOHN CHARLES BARR	§	COLLIN COUNTY, TEXAS

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes John Charles Barr, Defendant, and files this Motion for New Trial and in support thereof shows:

1. The Defendant sought a discovery order pretrial in this case. As part of the Defendant's request, the Defendant sought any witness statements given to the police. (See Ex. A, numbers C7 and D1) The court denied this request, allowing the statements to be produced only after the witnesses direct testimony at trial. (See Ex. A, numbers C7 and D1) The court also ordered any favorable evidence and material either to guilt or punishment turned over to the Defendant in this case, (See Ex. A, number H1) but denied the Defendant's request to depose the complaining witness pretrial. (See Ex. B) The Defendant, through his attorney, sent a certified letter and a first class letter to the complaining witness seeking to interview the witness pretrial. (See Ex. C) The complaining

witness never responded to the request and did not claim the certified letter (See Ex. D).

2. Eventually, after exhausting all reasonable means of discovery in this case, the Defendant entered an open plea, not wanting to risk a trial with a complaining witness of whom he knew nothing substantive about. ***At trial, after the complaining witness testified for the State,*** the Defendant learned for the first time that the complaining witness had given a statement, and that the statement included evidence that is arguably exculpatory and definitely mitigating in it. A copy of the complaining witness statement is included as Ex. E.

3. The essence of the complaining witnesses statement indicates that after the complaining witness switched lanes of traffic in front of the Defendant's vehicle to pass an 18 wheeler, that the Defendant's vehicle approached too closely to the complaining witnesses vehicle. The complaining witness then intentionally ***stepped on his brakes,*** knowing that the Defendant's vehicle was immediately behind and in very close proximity to the his own vehicle. Such actions on the part of the complaining witness ***were not taken out of necessity,*** but rather were taken in an attempt to scare and/or harm the Defendant. The actions admitted by the complaining witness, ***but hidden from the Defendant's attorney by the state*** show a very clear reason for the allegation of pulling a semi automatic gun and pointing it at the complaining witness - the Defendant was afraid of just what the complaining witness might do with his vehicle to harm the Defendant. The complaining witnesses statement clearly contained information that is favorable to the defense at both the guilt/innocence phase and at punishment.

4. The failure of the State to produce the complaining witnesses statement to the Defendant' s attorney in pretrial discovery constitutes a violation of the court's order to produce favorable evidence to the defense. Had the Defendant's lawyer known of the clearly mitigating evidence, he and the Defendant could have made an informed decision about the decision about whether to try this case on the merits and whether to waive a jury or not in this case. It is highly unlikely that the Defendant would have waived his right to a jury trial if he knew of the favorable ***Brady*** evidence constitutes a material error in this proceeding that effected the Defendant's decision on whether or not to knowingly and intelligently waive his right to a jury trial. If the favorable evidence had been timely disclosed to the defense, before a plea was entered on this case, their exists a reasonable probability that the results of this case would be different.

WHEREFORE, PREMISES CONSIDERED, in the interest of justice, Defendant prays that the Court set aside the judgment of conviction entered in this cause and order a new trial on the merits.

Respectfully submitted,

McCraw & McCraw
1415 Harroun
McKinney, TX 75069
Tel: (972)562-6262
Fax: (972) 548-0454

By: /s/_____
John L. (Lin) McCraw, III
State Bar No. 13482020
Attorney for John Charles Barr
State Bar No. 13482020

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF COLLIN §

BEFORE ME, the undersigned authority, personally appeared John L. (Lin) McCraw, III, who, on oath, stated that the statements made in the foregoing Motion for New Trial are true and correct.

/s/
John L. (Lin) McCraw, III

Sworn and subscribed before me on December 17, 2002.

/s/ Gloria Ann Guajardo
NOTARY PUBLIC

CERTIFICATE OF SERVICE

This is to certify that on December 17, 2002, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Collin County, 210 S. McDonald, Suite 324, McKinney, Texas 75069, by hand delivery

/s/
John L. (Lin) McCraw, III

NOTICE OF SETTING

On 18, 2002, the Defendant filed a Motion for New Trial, The Court finds that the party is entitled to a hearing on this matter, and a hearing on this motion is set for February 17, 2003, at 9:00 a.m.

Signed on December 18, 2002.

/s/_____
Judge Presiding

NO. 219-80130-02

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	219 JUDICIAL DISTRICT
	§	
JOHN CHARLES BARR	§	COLLIN COUNTY, TEXAS
	§	

MOTION FOR DISCOVERY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes John Charles Barr, Defendant in the above entitled and numbered cause, by and through undersigned counsel, and makes this Motion for Discovery, and for good cause shows the following:

I.

A. WITNESSES

Defendant moves the Court to order the District Attorney to produce and permit counsel for Defendant to inspect the following designated items relating to any witnesses in this case:

1. A list of the names and addresses of all witnesses the prosecution intends to call at trial. AGREED

2. A list of the names and addresses of all witnesses the prosecution intends to call at trial, ~~along with each expert's qualifications, the subject and a description of his or her contemplated testimony, and his or her report~~. AGREED AS MODIFIED.

3. Any evidence in possession of the state that any of its witnesses is presently incompetent to testify, or that any of its witnesses has been found incompetent to testify, incompetent, or insane. AGREED.

4. The criminal record of each witness for the state showing every conviction or probation for felony or misdemeanor involving moral turpitude which is admissible for impeachment under Rule 609 of the Texas Rules of Evidence. AGREED.

5. The criminal record of each witness for the state showing every event which can be used to impeach the witness including any deferred adjudication probations, arrests, or juvenile adjudications pending against the witness between the time of the offense alleged against Defendant and Defendant's trial to the extent that it is accessible by the State. AGREED AS MODIFIED.

6. All inducements offered by the state which might tend to motivate its witnesses to testify against Defendant, including, but not limited to, plea bargain agreements, fee, expense, or reward arrangements, agreements to dismiss or reduce or not bring charges, or any other agreement of leniency. AGREED.

7. All writings used to refresh the recollection of any witnesses, as provided in Rule 612 of the Texas Rules of Evidence available at time of cross-examination. AGREED AS MODIFIED.

B. STATEMENTS

Defendant moves the Court to order the District Attorney to produce and permit counsel for Defendant to inspect the

following designated items relating to any statements in this case:

1. All written confessions, admissions and statements, made by Defendant to the state in connection with this case. AGREED.

2. All oral confessions, admissions and statements, made by Defendant to the state in connection with this case, which have been electronically recorded. AGREED.

3. The substance of all oral confessions, admissions and statements made by Defendant to the state in connection with this case, which were not electronically recorded. GRANTED to the extent that the statement has been memorialized in the your supplements. DENIED as to other.

4. All statements, written or oral, electronically recorded or not, given by Defendant which are exculpatory or which tend to mitigate punishment. AGREED.

5. All written warnings, admonitions, rights and waivers given by the state to Defendant before Defendant gave any written or oral statements, admissions or confessions or testimony at any examining trial or grand jury hearing. AGREED.

6. All statements of a nature as would be arguably admissible as a "res gestae" statement, spontaneous statement, or other utterance which the State intends to introduce in its case in chief, either during the guilt/innocence stage, or during the punishment stage to the extent memorialized in case report. GRANTED.

7. All witness statements as that term is used in Rule 614 of the Texas Rules of Evidence, whether in final rough, draft, or other form. Available at time of cross-examination. AGREED AS MODIFIED.

C. WARRANTS AND WAIVERS

Defendant moves the Court to order the District Attorney to produce and permit counsel for Defendant to inspect the following designated items relating to warrants and/or any waivers in this case:

1. The arrest warrants and writs of capias, and affidavits in thereof, obtained by law enforcement authorities to arrest Defendant in this case. AGREED.

D.LAW ENFORCEMENT AND INVESTIGATION

Defendant moves the Court to order the District Attorney to produce and permit counsel for Defendant to inspect the following designated items relating to law enforcement and the investigation of this case:

1. Offense reports, police reports, crime scene investigation reports or records or reports of any third parties, by way of written memoranda, letters, notes or transcriptions involving the alleged facts of the offense, the crime scene or any location which may have a bearing on any issue of the case. DENIED.

2. The name, ~~rank and badge number~~ of any law enforcement officer and any employee of the Office of the District Attorney who participated in any way in the investigation of this case, whether at the scene, in transporting

Defendant, at the Police Station, at the jail or elsewhere. AGREED AS MODIFIED.

3. The name and address of any person (including any suspects in this case) interviewed by representatives of the State of Texas, whether an employee of a law enforcement agency or of the Office of the District Attorney or otherwise, in connection with this case. GRANTED to the extent that the statement has been memorialized in the case report and supplements. DENIED as to other.

4. All hand-written, typed or otherwise recorded notes of law enforcement officers, relating to any part of this case (such as arrest, investigation, interrogation, interviews, or any other aspect) who investigated or participated in the preparation of this case for trial, enforcement agency or of the Office of the District Attorney or otherwise, in connection with this case. DENIED.

E. PHOTOGRAPHIC EVIDENCE

Defendant moves the Court to order the District Attorney to produce and permit counsel for Defendant to inspect the following designated items regarding to photographic-related evidence in this case:

1 All photographs, videotapes, audiotapes, drawings, charts and diagrams made by the state or law enforcement agency with reference to this case. Available for review prior to jury selection as to what is prepared by prosecution. AGREED AS MODIFIED.

2. All photographs of the complainant, whether taken at the scene of the alleged offense, at the scene where the

complainant was discovered, at the hospital, or at the time the autopsy, if any. AGREED.

3. All photographs of suspects which were shown to all witnesses to the alleged offense, concerning the identity of the perpetrator of the offense for which Defendant has been charged. AGREED.

4. All photographs of Defendant which were used in the investigation of this case, including any photograph which may have been shown by any law enforcement officer to any potential witness in this case. AGREED.

F.PHYSICAL EVIDENCE

Defendant moves the Court to order the District Attorney to produce and permit counsel for Defendant to inspect the following designated items relating to physical evidence in this case:

1. All physical evidence seized by the state from Defendant in connection with this case. Available for review upon appointment. AGREED AS MODIFIED.

2. All physical evidence, property, documents, papers, books, accounts, letters, photographs, objects, records or tangible things belonging to Defendant which are now in the possession of the state or its agencies. Available for review upon appointment. AGREED AS MODIFIED.

3. All physical evidence in possession or control of the state which the intends to offer at trial in this case. Available for review upon appointment. AGREED AS MODIFIED.

4. The location from which each piece of physical evidence was found, the time it was found, and the name of the person who found it. Available for review upon appointment. AGREED AS MODIFIED.

5. All other physical evidence, property, documents, papers, books, accounts, letters, photographs, objects, tangible things or records which constitute or contain evidence material to any matter involved in this case which are in the possession, custody or control of the state or any of its agencies. Available for review upon appointment. AGREED AS MODIFIED.

G.TESTS, REPORTS AND SCIENTIFIC EVIDENCE

Defendant moves the Court to order the District Attorney to produce and permit counsel for Defendant to inspect the following designated items relating to tests, reports and any other scientific evidence in this case:

1. All reports of scientific tests, experiments and comparisons, and the name of each person who made such report or performed such tests, experiments or comparisons, including, but not limited to, weapons and fingerprints. AGREED.

H. STATE EVIDENCE

Defendant moves the Court to order the District Attorney to produce and permit counsel for Defendant to inspect the following designated items relating to State's evidence in this case:

1. All evidence in possession of, or within the knowledge of, the state or any of its agencies, including impeachment

evidence, which is favorable to Defendant and material either to guilt or to punishment. AGREED.

II.

In support of this motion, Defendant would show that: (a) the items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by and through its agents, the police or the prosecuting attorney's office, and Defendant has no other means of ascertaining the disclosure requested; (b) the items requested are not privileged; (c) the items and information requested are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause; (d) Defendant cannot safely go to trial without such information and inspection, nor can Defendant adequately prepare a defense herein; (e) Defendant's rights will be violated under Article 39.14 of the Texas Code of Criminal Procedure, Article I, Sections 3, 3a, 10, 13 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America by such absent such discovery.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that this Honorable Court will grant this Motion for Discovery in all things, or in the alterative, that this Court will set this matter for a hearing prior to trial on the merits and that at such hearing this Motion will be in all things granted.

Respectfully submitted,

McCraw & McCraw
1415 Harroun
McKinney, TX 75069

Tel: (972) 562-6262
Fax: (972) 548-0454

BY: /s/_____
John L. (Lin) McCraw, III
State Bar No. 13482020
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on May 3, 2002, a true and correct copy of the above and foregoing document was hand delivered to the District Attorney's Office, Collin County, 210 S. McDonald, Suite 324, McKinney, Texas 75069, by certified mail, return receipt requested.

/s/
John L. (Lin) McCraw, III

NO. 219-80130-02

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	219th JUDICIAL DISTRICT
	§	
JOHN CHARLES BARR	§	COLLIN COUNTY, TEXAS
	§	

APPLICATION AND AFFIDAVIT TO TAKE DEPOSITION TESTIMONY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes John Charles Barr, and files this Application to Take Deposition Testimony pursuant to Article 39.02 of the Texas Code of Criminal Procedure, and in support would show:

1. John Charles Barr desires to have the deposition of Mark Earl Hixon taken on June 19, 2002.

2. As stated in the attached affidavit, there are sufficient facts necessary to constitute a good reason for the taking of the deposition. Specifically:

A. Mr. Hixon is the complaining witness in this first degree felony case. He is the only witness to the facts leading up to this charge. To insure a quicker, more concise cross examination at trial, this deposition is needed to flesh out areas for inquiry that may be calculated to lead to the discovery of admissible evidence but may not ultimately be admissible in trial. Further, if such discovery is not allowed, the defendant may be deprived of effective assistance of counsel in as much as critical evidence may be revealed when

it is too late for the defendant to gather controverting evidence that cannot be anticipated without the deposition testimony requested. Lastly, it appears that Mr. Hixon has a prior criminal record that may be for a crime involving moral turpitude. See Exhibit A. It is necessary to depose him to confirm the existence of the charge, the conviction and the court where it occurred. Defendant believes that it is necessary to depose as opposed to merely interview a complaining witness with a prior conviction of a crime involving moral turpitude in order to have a written sworn record that the Defendant can rely upon in court as opposed to the mere notes of an attorney that can result in merely a swearing match at the time of trial.

WHEREFORE, PREMISES CONSIDERED, John Charles Barr respectfully requests that the Court grant his Application to Take Deposition Testimony.

Respectfully submitted,

McCraw & McCraw
1415 Harroun
McKinney, TX 75069
Tel: (972) 562-6262
Fax: (972) 548-0454

By: /s/
John L. (Lin) McCraw, III
State Bar No. 13482020
Attorney for John Charles Barr

CERTIFICATE OF SERVICE

This is to certify that on June 6, 2002, a true and correct copy of the above and foregoing document was served on the

District Attorney's Office, Collin County, 210 S. McDonald, Suite 324, McKinney, Texas 75069, by hand delivery.

/s/_____
John L. (Lin) McCraw, III

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF COLLIN §

After being placed under oath, John Charles Barr made the following affirmation:

"I am of sound mind, capable of making this affidavit and personally acquainted with the facts herein stated.

"The reasons which support the taking of a deposition of Mark Earl Hixon are as stated:

> "Mr. Hixon is the complaining witness in this first degree felony case. He is the only witness to the facts leading up to this charge. As I understand the District Attorney's theory, of the case, he alleges that the defendant waived a gun in the general direction of the complaining witness after some sort of a confrontation while both the defendant and the complaining witness were in their automobiles.
>
> A deposition is needed to insure a quicker, more concise, cross examination at trial. It is needed to flesh out areas for inquiry that may be calculated to lead to the discovery of admissible evidence but may not ultimately be admissible in trial. Further, if such discovery is not allowed, the defendant may be deprived of effective assistance of counsel in as much as critical evidence may be revealed when it is too late for the defendant to discover and gather controverting evidence that cannot be anticipated without the deposition testimony requested.

I have gathered evidence that seems to indicate that Mr. Hixon has a prior criminal record that may be for a crime involving moral turpitude. See Exhibit A. It is necessary to depose him to confirm the existence of the charge, the conviction and the court where it occurred. I believe that it is necessary to depose as opposed to merely interview a complaining witness with a prior conviction of a crime involving moral turpitude in order to have a written sworn record that the Defendant can rely upon in court as opposed to the mere notes of an attorney that can result in merely a swearing match at the time of trial.

"The statements contained within the Application to Take Deposition are true and within my personal knowledge."

/s/_____
John L. (Lin) McCraw, III, Affiant

Sworn to and subscribed before me on _____

/s/_____
NOTARY PUBLIC

ORDER FOR A SETTING

On ____, 2002, the Defendant filed a Application and Affidavit to Take Deposition Testimony. The Court finds that the party is entitled to a hearing on this matter, and it is THEREFORE ORDERED that a hearing on this motion is set for _____, at _____. Signed on _____.

/s/_____
Judge Presiding

PUBLICDATA.com

Texas Driver Detail

Name	*License number*
HIXON, MARK EARL	007024271

Address	*DOB*	*Class*
RT 1 Box 163	Jun 5 1953	

City/Zip	*Gender*	*Race*
FARMERSVILLE 75442	Male	White

Height	*Weight*	*Eye Color*	*Hair*
600	240	Blue	Blonde

Last transaction date	*Last transaction*
Jun 17 1998	Correction no fee entered

Above information as provided by state - below is our annotations

Address (click to find others)	*City/State/Zip (click to find others)*
RR 1 Box 163	Farmersville, TX 75442-9786

PUBLICDATA.com

Texas Criminal Detail

Name	*Sid number*
HIXON, MARK EARL	02116635

Race	*Sex*	*Eyes*	*Hair*	*Height*
White	M	Blue	Blond/Strawberry	601

Weight	*Birth Date*
230	Jun 5, 1953

Alias Names	*Alias Date of Births*
HIXON, MARK	none found
HIXON, EARL	
HIXON, M E	
HIXON, E M	

Cause Number	*Court offense literal*
	FRAUD-INSUFF FUNDS CHECK - PASS
	WORTHLESS CHECK

General offense character for court offenses
none found

Court Disposition Date *Final Plea to Offense*

Level and degree of offense
Uncoded

Agency	*State*	*County*
		none found

Court offense number
26060000

Offense
FRAUD-INSUFF FUNDS CHECK

Citation *Statute* *Active* *Modified*
YYYYMMDD UNKNW

Level and degree of offense *Statute citation for offense*
Uncoded

Court Disposition Number
310

Definition
SUBJECT HAS BEEN FOUND GUILTY OF A CRIMINAL CHARGE, EITHER UPON A CRIMINAL TRIAL, A PLEA OF GUILTY, OR A PLEA OF NOLO CONTENDERE.

Date of sentence *Court sentence suspended - time*

Court sentence suspended - fine

Court confinement *Court probation* *Court fine*

Court cost *Court provision literal*

Court provision numeric
338

Definition

THE MONETARY AMOUNT TO BE PAID IS A COMBINATION OF FINE AND COURT COSTS

Date case appealed

Disposition during appeal

Definition
none found

Final disposition on appeal case
Uncoded

Multiple sentence
Single Sentence

Agency State *County*
none found

McCraw & McCraw
ATTORNEYS AT LAW
1415 HARROUN
MCKINNEY, TEXAS 75069

John L (Lin) McCraw, III
Mark McCraw

OF COUNSEL:
John L. McCraw, Jr.

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Telecopier (972) 548-0454
E-MAIL: lin@mccrawlaw.com

August 2, 2002

Via First Class Mail
Via Certified Mail RRR # 7001 2510 0001 8476 1579

Mr. Mark Hixon
Rt. 1, Box 163
Farmersville, Texas 75442

Re: State v. John Charles Barr

Dear Mr. Hixon:

I represent John Charles Barr in a case filed against him by the State of Texas. You are listed as the complaining witness in the indictment returned against Dr. Barr. As I am sure that you can understand, in order to do my job, I must be able interview all witnesses involved in this matter. If I was defending you in a case brought by the State, you would expect me to interview the State's main witness in advance of trial, would you not? The problem is that I have left telephone messages at least two different times on a recorder earlier this summer and have not received a return call, so I am left with no other option but to write you and seek a time that I may

interview you. I want to give you the benefit of the doubt that the calls did not reach you.

Please call my office at the above phone number so that we can set a time and place for the interview (which I will do at your convenience). If you would feel more comfortable, I will be happy to meet you with a representative of the District Attorney's Office present for the interview, if they feel like showing up.

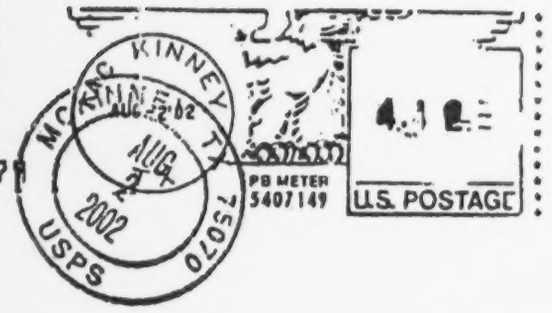
I have had occasions in the past where some representatives of the District Attorney's office have attempted to impede an honest investigation of the facts surrounding a criminal case. I hope that it has not happened in this case. I hope that any lawyer in that office recognizes their ethical duty to seek justice for all concerned, including the person accused of a crime. Asking witnesses to hide from the defense or not to cooperate with a fair investigation by the defense does not further the goals of the ethical rules that prosecutors must follow.

Please call me and I will do my best to get your story in as quick and painless manner as possible. If I don't hear from you in ten days from your receipt of this letter, I will assume that you do not intend to give me an interview prior to the trial of this matter.

Sincerely,
/s/
John L. (Lin) McCraw, III

McCraw & McCraw
Attorneys At Law
John L. (Lin) McCraw, III
1415 Harroun St.
McKinney, Texas 75069

7001 2510 0001 8476 1579



8-3-02
8/8
8/18

CMRRR# 7001 2510 0001 8476 1579
Mr. Mark Hixon
~~Rt. 1, Box 163~~ 2649 FM 36
Farmersville, Texas 75442

Ex D

73442+3786 01
75069/3430

CERTIFIED MAIL

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* | C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
ES, enter delivery address below: ☐ No

CMRRR# 7001 2510 0001 8476 1579
Mr. Mark Hixon
Rt. 1, Box 163
Farmersville, Texas 75442

vice Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 7001 2510 0001 8476 1579

PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-0835

THE CITY OF PRINCETON

306 NORTH FRONT STREET OR P. O. BOX 970
PRINCETON, TEXAS 75407
972/736-2548
FAX: 972/736-6347

VOLUNTARY STATEMENT
(Not Under Arrest)

CFS #: 36427 Reference: ACCIDENT INV Date: 9-6-01

I, MARK HIXON, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to MARK DICKERSON, who is a Princeton Official. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve. I am 48 years of age, and I live at FARMERSVILLE, TX. My race is W. My sex is M. My date of birth is 6-5-53. My ID # is 07024271. My home number is: (903) 776-2070. My work number is: (903) 776-2228.

I had left McKinney @ ABOUT 12:00. TRAveling EAST bound on Hwy 380. TRAFFIC WAS LIGHT & I WAS in the RIGHT LANE with my 18 wheeler. AHead of me ABOUT 1 mile. There was a [redacted] Jeep in the left lane slightly behind me. After PASSing BAILEY FARMER Road Starting up 1ST Hill I WAS GAining on 18 wheeler. I Glanced in my Side View MIRROR And Felt I WAS clear of the Jeep. I CHANGED LANE from the Right lane to the left. About the time I WAS Even with the 18 wheeler I SAW the Jeep Speed up & Get Right on my Bumper. While I ACCELERATED the Jeep WAS Ever closer, I STEPPED on My BRAKES And then ACCELERATED PAST the 18 wheeler And moved BACK to the Right lane. AT this time I WAS About 1/4 mile AHead of Both vehicles And I SAW the JEEP COME in

I have read each page of this statement. Each page bears my signature, and corrections, with my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 305 PM on the 6 day of September 2001.

Witness: M. Dickerson IBS

Mark Hixon
Signature of Person giving voluntary statement

City of Princeton Form 12/99-01

EX. E

THE CITY OF PRINCETON

306 NORTH FRONT STREET OR P. O. BOX 970
PRINCETON, TEXAS 75407
972/736-2548
FAX: 972/736-6347

VOLUNTARY STATEMENT
(Not Under Arrest)

CFS #: _____ Reference: _____ Date: _____

I, _____, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to _____, who is a Princeton Official. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve. I am _____ years of age, and I live at _____. My race is _____. My sex is _____. My date of birth is _____. My ID # is _____. My home number is: ( )_____. My work number is: ( )_____.

Behind me, but at a distance. Within about a mile the Jeep pulled into the left lane accelerated up beside me, rolled down his window. I looked over again and saw the driver [redacted]. I had shot combat for about 2 years and recognized the gun as [redacted]. The most alarming and disturbing thing was the gun had a laser sight & it was turned on pointing at my face. I hit my brakes and let the Jeep go by. I immediately picked up my cell phone & dialed 911. I was transferred to county & gave a description of the car & driver. Mostly gun. I was shaken but stayed with the Jeep and 911. The Jeep stayed [redacted] through Princeton and into Farmersville. Shortly after the

I have read each page of this statement. Each page bears my signature, and corrections, with my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at _____ M on the _____ day of _____.

Witness: _____

Signature of Person giving voluntary statement

THE CITY OF PRINCETON

306 NORTH FRONT STREET OR P. O. BOX 970
PRINCETON, TEXAS 75407
972/736-2548
FAX: 972/736-6347

VOLUNTARY STATEMENT
(Not Under Arrest)

CFS #: _____ Reference: _____ Date: _____

I, _____, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to _____, who is a Princeton Official. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve. I am _____ years of age, and I live at _____. My race is _____. My sex is _____. My date of birth is _____. My ID # is _____. My home number is: ( )_____. My work number is: ( )_____.

Farmersville Police Made a traffic Stop And I felt like the [redacted] was over.

I have read each page of this statement. Each page bears my signature, and corrections, with my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at _____ M on the _____ day of

Witness: _____

Signature of Person giving voluntary statement

(2)

Supreme Court, U.S.
FILED
AUG 2 - 2004
OFFICE OF THE CLERK

No. 03-1692

IN THE SUPREME COURT OF THE UNITED STATES

JOHN CHARLES BARR,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION

JOHN R. ROACH
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Collin County, Texas

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*Counsel of Record

ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED BY PETITIONER

Does a state prosecutor who withholds evidence favorable to the accused until after the defendant enters a plea of guilty violate the due process clause of the Fifth Amendment as made applicable to the States through the due process clause of the Fourteenth Amendment?

QUESTION REFRAMED BY RESPONDENT

Since *Brady* concerns a defendant's due process right to a "fair trial," may a defendant who pleads guilty and thus waives that right later raise a *Brady* claim regarding possible affirmative-defense–related evidence that was first disclosed at his punishment hearing?

LIST OF PARTIES

The only parties to the proceeding in the court whose judgment is sought to be reviewed are those contained in the caption of the case.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, the State of Texas, respectfully requests this Court to deny the petition for writ of certiorari where the Question Presented concerns the application of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to a defendant who has pleaded guilty. Briefly, because there is no *Brady* material at issue, this Court need not reach the Question Presented. Further, the Court's decision in *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002), and Texas state law provide sufficient guidance on the Question Presented, so that no compelling reason exists to take up this petition.

JURISDICTION

The Texas Court of Criminal Appeals refused the petitioner's petition for discretionary review on March 24, 2004. The petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Procedural History

At a bench trial, Petitioner John Charles Barr ("Barr")[1] entered a non-negotiated plea of guilty to the second-degree felony offense of aggravated assault with a deadly weapon, namely a firearm. 2 RR 3; CR 76. He had threatened complainant Mark Hixon ("Hixon") with a laser-sighted Glock semiautomatic pistol as he drove alongside Hixon on a highway in Collin County, Texas. 2 RR 3; CR 76. The trial court sentenced him to four years confinement in the state

[1] Respondent State of Texas will be referred to as the "State."

penitentiary. 2 RR 152. Barr's motion for new trial was overruled. CR 3.

Barr appealed his conviction, claiming that the State wrongly withheld evidence that would have supported a defense of self-defense at trial. He argued that *Brady* required pre-trial disclosure of Hixon's statement to the police that he had stepped on his brakes while in front of Barr's fast-approaching vehicle, prior to Barr pointing the gun at him, because that evidence was relevant to a self-defense claim.

The court of appeals affirmed Barr's conviction, finding both that he had waived his *Brady* claim by pleading guilty and that Hixon's police statement was not *Brady* material because his act of stepping on his brakes did not constitute a defense to Barr's subsequent assault. *See John Charles Barr v. State of Texas*, 2003 WL 22412187, No. 11-03-00030-CR (Tex.App.—Eastland, October 23, 2003, pet. ref'd) (not designated for publication) (attached to Petition for Writ of Certiorari as Appendix B). The Texas Court of Criminal Appeals refused Barr's petition for discretionary review, and Barr did not file a motion for rehearing.

II. Facts of the Offense

At the sentencing hearing, Hixon and Barr told two very different versions of the offense, neither supporting Barr's post-trial claim of self-defense.

A. Hixon's Version

Traveling in the right lane of a four-lane highway, Hixon changed lanes in an attempt to pass a slow eighteen-wheeler truck. 2 RR 62. In doing so, he pulled in front of Barr's Jeep. *Id.* When Hixon was even with the eighteen-wheeler, he noticed in his rearview mirror that Barr was "right on [his] bumper." 2 RR 63.

Hixon tapped or stepped on his brakes, and Barr backed off. 2 RR 63, 70, 75, 76-77; CR 114. Hixon passed the eighteen-wheeler and pulled back into the right lane. 2 RR 63; CR 114. Within a few seconds, Barr's Jeep, right window rolled down, pulled up on Barr's left side. 2 RR 63; CR 114-15. Barr looked at Hixon, showed him a semiautomatic pistol with a laser sight, then turned the gun toward Hixon's face and lit up the laser. 2 RR 19-20, 63-64, 73-74, 82. Barr was smiling. 2 RR 65.

Barr pulled into the lane in front of Hixon, and no further confrontation took place. 2 RR 66. Hixon used his cellular telephone to call the police and followed Barr until the police made the stop. 2 RR 66-67, 72-73, 91.

Initially Barr told police he did not have a gun that fit Hixon's description. 2 RR 68, 72, 75. But eventually the police found the weapon in the Jeep, along with a collapsible baton, a set of brass knuckles, two magazines of ammunition, and several bullets. 2 RR 68, 83-84. There was a bullet in the chamber of the gun. 2 RR 83.

B. Barr's Version

Barr denied to the police that he had pointed a gun at Hixon. 2 RR 88. According to Barr, when Hixon pulled in front of him to pass the eighteen-wheeler, a Coke he was drinking spilled on him and on his gun, which was located on the floor of the Jeep's passenger side. 2 RR 18-19, 33. He was wiping the gun off with a towel when he accidentally hit the lever that turns the laser beam on and the laser shined into Hixon's window, glancing off his rearview mirror and bouncing back into Barr's eye. 2 RR 19.

Barr was very upset about that, he said, because he "wasn't actually trying to point the gun at the gentleman." 2 RR 19; *see also* 2 RR 35. He acknowledged that it appeared to Hixon and even to him that he intentionally pointed the gun,

and that is why he pleaded guilty (2 RR 19-20, 21-22), but in fact he "was very sorry, and [he] was just trying to clean . . . the Coke off the gun." 2 RR 20.

III. Additional Facts Relevant to This Petition

In a pretrial discovery motion, Barr requested and the State agreed to provide all evidence favorable to him and material to his guilt or punishment. CR 30. Barr also requested all witness statements, which the State agreed to make available at cross-examination. CR 27.

At the punishment stage of the trial, the State provided Barr with Hixon's written police statement prior to his cross-examination. 2 RR 68, 69; CR 114. Barr did not object to the statement at all, did not ask for a continuance, and did not make any motion to withdraw his guilty plea.

ARGUMENT

I. There is no *Brady* material at issue.

There is no *Brady* material at issue in this case. Barr's claim of *Brady* material is based on critical misstatements regarding the nature of his conduct and Texas's law of self-defense.[2]

A. By claiming that he acted in self-defense, Barr has critically misstated the nature of his conduct.

In Barr's account of the offense in his statement of the case, he notes that Hixon engaged his brakes after he pulled his vehicle in front of Barr's Jeep. He then represents:

> Reacting to the threat caused by Mr. Hixon's vehicle, Dr. Barr slowly pulled a pistol while

---

[2] *See* Rules of the Supreme Court of the United States, Rule 15.2 (requiring misstatements to be identified or risk being waived).

> driving past Mr. Hixon, calmly drove past Mr. Hixon's vehicle lowering the gun once the threat subsided and Dr. Barr was safely past Mr. Hixons's vehicle.

Petition for Writ of Certiorari at 3; *see also* Petition for Writ of Certiorari at 19. But there is no evidence in the record that Barr felt a *threat* by Hixon's vehicle, that he pulled the gun on Hixon *slowly,* that he *calmly* drove past Hixon's vehicle, or that the reason he lowered the gun is that he *felt a threat had subsided.* These embellishments to the facts are clearly supplied to coincide with Barr's post-trial claim of self defense. Indeed, Barr's testimony at his sentencing hearing—that he *inadvertently* pointed the gun at Hixon—is antithetical to what he is now representing to this Court. Barr testified:

> And I spilled the Coke, when he cut in front of me, I spilled the Coke on myself and on the Jeep seat, and on the gun. . . .
>
> I reached down and picked up the gun, and I had a rag, a towel in the passenger seat of the Jeep, and I was wiping the Coke off the handgun. And it had a lazer [sic] sight on it. And the lazer sight shined in the front, the window of . . . this man's truck and glanced off his rearview mirror. . . .
>
> I was very upset about it. I wasn't actually trying to point the gun at the gentleman, but I was wiping it off with a towel and must have hit the little lever that turns the lazer beam on.

2 RR 19. Hixon's testimony that Barr was smiling while he pointed a gun at him further belies Barr's current claim that he was feeling threatened. 2 RR 65. Also inconsistent with a claim

of self-defense, when stopped by police Barr denied pointing the gun at Hixon. 2 RR 68, 72, 75, 88.[3]

B. Barr has mischaracterized Texas's law of self-defense.

Throughout the instant petition for writ of certiorari, Barr asserts that the fact that Hixon stepped on his brakes supports a defense of self-defense under Texas law. *See* Petition for Writ of Certiorari at 3, 5, 6, 18, 19. But that is not a fair representation of Texas law. Pointing a loaded, laser-sighted semiautomatic pistol at Hixon was not immediately necessary for Barr's protection. *See* TEX. PENAL CODE § 9.31 (a person is justified in using force when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force). Further, Barr could easily have retreated from any perceived danger with the simple action of slowing his Jeep down and distancing himself from Hixon. *See* TEX. PENAL CODE § 9.32(a)(2) (use of deadly force justified only when retreat is unreasonable). Therefore, under Texas law, Barr's actions would not have constituted self-defense even if he had taken them in response to Hixon's stepping on his brakes.

---

[3] Barr also asserts in this petition for writ of certiorari that "[a]t a minimum, counsel for the accused could have used the information [that Hixon engaged his brakes] to lower the punishment assessed during the punishment phase of trial." Petition for Writ of Certiorari at 19. But Barr's counsel had that information during the punishment stage, cross-examined Hixon about it, and referred to it during his closing argument. 2 RR 69-71, 76-77, 147. Thus Barr's claim that he would have received a lesser punishment if the court had considered the information has already been proven false.

Barr also misstates his testimony when he asserts that he entered his plea of guilty because of the State's response to his request for discovery. *See* Petition for Writ of Certiorari at 3, 7, 14. At his punishment hearing, he testified that he pleaded guilty because it appeared from his actions that he had intended to scare Hixon with the gun. 2 RR 19-20, 21-22.

C. Conclusion

Thus, Barr claims there was *Brady* material when there was none. His actions were not defensive. And Texas's law of self-defense does not allow a driver to pull alongside another driver and aim a laser-sighted semiautomatic pistol at him in retaliation for being cut off. Evidence that Hixon stepped on his brakes—the supposed trigger for Barr's actions—was not favorable or material to any valid defense. It was therefore not *Brady* material and was not wrongly withheld.

This Court can thus deny the instant petition for writ of certiorari for the simple reason that there is no *Brady* material at issue. It need not, and should not, reach Barr's Question Presented.

II. Even if the evidence was *Brady* material, current federal and state law sufficiently address the Question Presented.

Even if evidence that Hixon stepped on his brakes was *Brady* material, current federal and state law sufficiently address Barr's Question Presented, whether he waived his *Brady* claim by pleading guilty. This Court's opinion in *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002), guides the federal constitutional analysis. In *Ruiz*, this Court upheld the constitutionality of a "fast track" plea agreement requiring a defendant to waive, *inter alia*, her right to receive impeachment evidence and evidence related to affirmative defenses. *Ruiz*, 536 U.S. at 633, 122 S.Ct. at 2457. As the Court noted, *Brady* recognizes the Constitution's basic "fair trial" guarantee. 536 U.S. at 628, 122 S.Ct. at 2454-55. But when a defendant pleads guilty, as Barr did here, he waives that guarantee. 536 U.S. at 628-29, 122 S.Ct. at 2455.

Although Ruiz challenged the constitutionality of the waiver of *impeachment* evidence, not evidence related to an *affirmative defense*, the Court addressed its opinion to that type

of evidence as well. 536 U.S. at 633, 122 S.Ct. at 2457. And as Justice Thomas stated in his concurring opinion:

> [T]he Constitution does not require the Government to disclose either *affirmative defense* information or impeachment information . . . before entering into a binding plea agreement with a criminal defendant. . . . The principle supporting *Brady* was "avoidance of an *unfair trial* to the accused." . . . That concern is *not implicated at the plea stage* regardless.

Ruiz, 536 U.S. at 633-34, 122 S.Ct. at 2457 (Thomas, J., concurring) (emphasis added; citations to authority omitted). Also, although the guilty plea in *Ruiz* was entered as part of a plea bargain, if *Brady* seeks only to avoid an unfair *trial*, the Court's holding should just as well apply to a guilty plea entered without the benefit of a plea agreement. *Ruiz*, therefore, provides sufficient guidance on the Question Presented.

Barr does not adequately distinguish the holding in *Ruiz*. Rather, he re-presents pre-*Ruiz* arguments—that his plea was involuntary because he did not have the benefit of Hixon's statement (*see* Petition for Writ of Certiorari at 11, 13) and that if *Brady* claims are waived by a guilty plea a prosecutor will have an incentive to withhold *Brady* information until after the plea (*see* Petition for Writ of Certiorari at 15)—that were a part of the Ninth Circuit's opinion in *Ruiz* that was reversed.

Further, under Texas law, a defendant who enters a valid non-negotiated plea of guilty waives the right to appeal a claim of error, including *Brady* error, when the judgment of guilt is rendered independent of, and is not supported by, the error. *See Young v. State*, 8 S.W.3d 656, 666-67 (Tex.Crim.App. 2000); *Ramirez v. State*, 89 S.W.3d 222, 231-32 (Tex.App.—Corpus Christi 2002, no pet.) (applying *Young* to appellant's complaint that State did not produce exculpatory evidence prior to his

plea). In this case, the trial court's judgment of guilt was based on testimonies of Hixon and Barr that Barr pointed his pistol at Hixon. The judgment was wholly independent of the fact that Hixon stepped on his brakes. Therefore, under *Young*, by entering his plea of guilty Barr waived any obligation the State may have had to disclose that fact.

Barr has not presented any compelling reason why, under the facts of his case, this Court should circumscribe *Ruiz* or upend *Young* to grant him the relief he seeks in this petition. *See* Rules of the Supreme Court of the United States, Rule 10 (providing that review on writ of certiorari is not a matter of right, but of judicial discretion, and should be granted only when compelling reasons warrant). This Court should deny this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Barr's petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN R. ROACH
Criminal District Attorney
Collin County, Texas

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Assistant Criminal District Attorney
Chief of the Appellate Division
210 S. McDonald Street, Ste 324
McKinney, Texas 75069
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